STATE OF MICHIGAN

COURT OF APPEALS

BRENDA CAROL POLASEK-SAVAGE,

Plaintiff/Counter-Defendant-Appellant,

v

TIMOTHY WARD SAVAGE,

Defendant/Counter-Plaintiff-Appellee.

UNPUBLISHED
August 21, 2003

No. 239891
Oakland Circuit Court
LC No. 00-632733-DM

Before: Donofrio, P.J., and Bandstra and O'Connell, JJ.

PER CURIAM.

Plaintiff appeals as of right the judgment of separate maintenance. We affirm in part, reverse in part, and remand this matter for further proceedings consistent with this opinion.

I. Basic Facts and Procedural History

After twenty-one years of marriage plaintiff filed a complaint for divorce. Defendant filed a counterclaim for divorce and the matter proceeded to trial, during which the trial court heard testimony regarding a rare book collection alleged by plaintiff to have been gifted to the parties by defendant's mother. According to plaintiff, after taking possession of the books in 1990, the collection remained in the parties' marital home until it was removed by defendant sometime in 1997, after the couple began having marital problems. Defendant and his mother testified, however, that the books were never gifted to the parties but rather were loaned to the couple and were returned to defendant's mother at her request in 1996. Nonetheless, defendant and his mother acknowledged that throughout the parties' marriage defendant had received yearly cash gifts from his mother totaling between $6000 and $8000, and that he also receives an annual cash payment of $10,000 from a trust established by his aunt. With respect to the cash gifts given by her to her son, however, defendant's mother stressed that she had no legal obligation to gift defendant that money and had in fact discontinued the practice in 1999.

Before the close of proofs the parties entered into the record a "partial settlement," to which both parties assented. As presented to the trial court, this settlement included an agreement that both parties would withdraw their complaints for divorce and proceed with this matter as an action for separate maintenance. The settlement further included, among other provisions not relevant here, an agreement that plaintiff would "waive any claims she could have

against . . . [defendant's] parent's books," leaving only the issues of child and spousal support as matters for the trial court to decide.

With respect to the support issues, plaintiff argued that the yearly "gifts" received by defendant from his aunt and mother should be considered "income" for purposes of determining defendant's child support obligation. Although acknowledging that the Michigan Child Support Formula does not specifically provide for consideration of gifts as income, plaintiff asserted that given the historically regular nature of the gifts, as well as the fact that those funds were used to satisfy basic familial needs, it would be "totally inappropriate to overlook such a substantial contribution to the . . . income of the parties." The trial court, however, found that the funds historically received by defendant from his aunt and parents should not be considered when computing defendant's child support obligations:

> The Child Support Formula does not refer to gifts or inheritances, historically or otherwise as a factor to be considered in [the] calculation of child support. There are also no cases which would allow the imputation of income based on assets not yet received. However, the Court does believe that if Defendant receives inheritance in the future, it should be reported to Plaintiff and the Friend of the Court within ten days after receipt. The Court directs Defendant to pay 10% of any inheritance received as additional child support. Defendant is to pay Plaintiff directly and any dispute must be submitted to arbitration.

The trial court also ruled that, with respect to spousal support, defendant was to similarly report the receipt of any "inheritance or gifts," and to pay ten percent of any "inheritance received as additional spousal support."[1] These rulings were ultimately incorporated into the judgment of separate maintenance that is the subject of this appeal.

II. Jurisdiction

We first address defendant's claim that this Court is without jurisdiction to hear this matter because plaintiff failed to timely file her appeal of right. Defendant earlier raised this issue in a motion to dismiss this appeal, which this Court denied. The law of the case doctrine mandates that, absent a change of law or facts, a ruling by an appellate court on a particular issue binds the appellate court and all lower tribunals as to that issue. See *Grievance Administrator v Lopatin*, 462 Mich 235, 260; 612 NW2d 120 (2000). Here, there is no evidence that either the facts or the law relevant to this issue have changed since this Court entered its earlier decision. Accordingly, because "a decision of an appellate court is controlling at all subsequent stages of the litigation as long as it is unaffected by a higher court's opinion," we reject defendant's claim

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[1] We note that, unlike its ruling regarding child support, the trial court required defendant to report both "gifts" as well as inheritance with respect to spousal support. However, we further note that despite the additional requirement to report gifts, the trial court did not require that defendant pay a percentage of those gifts to plaintiff as additional spousal support. The record is unclear as to whether this discrepancy was intentional or inadvertent. In any event, this should be clarified in further proceedings following remand.

that we are without jurisdiction to hear this matter. *McNees v Cedar Springs Stamping (After Remand)*, 219 Mich App 217, 222; 555 NW2d 481 (1996).

III. "Income" for Purposes of Support Obligations

Plaintiff first argues that the trial court erred in failing to consider the funds historically received by defendant from his family as income for purposes of determining defendant's child support obligation. For the reasons that follow, we agree. Whether the monies at issue constitute income for purposes of determining support is a question of law subject to review de novo on appeal. See *Atchison v Atchison*, 256 Mich App 531, 534-535; 644 NW2d 249 (2003).

Initially, we note that the Michigan Child Support Formula expressly provides that trust fund payments constitute "income" for purposes of determining a noncustodial parent's child support obligation. See Michigan Child Support Formula Manual (West, 2001), § II(A); see also *Coverston v Kellog*, 136 Mich App 504; 357 NW2d 705 (1984) (income from spendthrift as well as support trusts can be reached to satisfy claim for spousal and child support). Thus, to the extent that the trial court found no basis in the formula for consideration of the yearly payments received by defendant from the trust established by his aunt, the trial court erred.

Moreover, the mere fact that the Michigan Child Support Formula does not expressly refer to a specific source of income as a factor to be considered in the calculation of child support is an insufficient basis to decline consideration of that factor. This very reasoning was rejected by this Court as "much too narrow" in *Malnar v Malnar*, 156 Mich App 534, 536-537; 401 NW2d 892 (1986). There, the panel considered whether food and fuel vouchers received by the defendant father as part of his strike benefits constituted income for purposes of determining the father's child support obligation. In concluding that the vouchers were properly considered by the trial court despite the absence of an express provision for consideration of such benefits in the Support and Visitation Enforcement Act, MCL 552.601 *et seq*., the panel observed:

> When the noncustodial parent has the financial means to support and maintain his own children, the source thereof is immaterial. *Dillon v Dillon*, 318 Mich 686; 29 NW2d 126 (1947). While the duty imposed on the parent must be fair and not confiscatory, the parent's duty to support his children is not limited to his income. *Travis v Travis*, 19 Mich App 128; 172 NW2d 491 (1969). In determining the amount of support, in addition to income, all relevant aspects of the financial status of the person obligated to pay support must be considered. *Cymbal v Cymbal*, 43 Mich App 566; 204 NW2d 235 (1972). [*Malnar*, *supra* at 538.]

Here, the substantial amounts regularly received by defendant as gifts from his mother were certainly "relevant aspects" of his financial status warranting consideration in the determination of his child support obligation. *Id*. This is not to say, however, that the trial court's failure to include those funds as income for the purpose of determining defendant's child support obligation was itself error. Indeed, a trial court has discretion to determine the amount of child support to be awarded, *Morrison v Richerson*, 198 Mich App 202, 211; 497 NW2d 506 (1993), and there was evidence here to indicate that the gifts formerly received by defendant from his mother would no longer continue. Nonetheless, given the trial court's failure to recognize a legal basis for consideration of the subject monies, we conclude that remand is necessary to afford the trial court the opportunity to consider those funds, as well as the annual

payments received by defendant from the trust established by his aunt. We further conclude that, to the extent consideration of these funds is relevant to defendant's ability to pay spousal support, see *Thames v Thames*, 191 Mich App 299, 308; 477 NW2d 496 (1991), the trial court should revisit the issue of spousal support on remand as well.[2]

IV. Rare Book Collection and Binding Arbitration

Plaintiff next argues that the trial court erred in failing to determine that the rare book collection returned to defendant's mother was part of the marital estate to be split by the parties. We disagree. Generally, this Court will review a dispositional ruling of the trial court to determine whether the court reached a fair and equitable result in light of its factual findings. *Sparks v Sparks*, 440 Mich 141, 151-152; 485 NW2d 893 (1992). Here, however, the books at issue were included in the oral settlement agreement placed on the record at trial and assented to by the parties. Accordingly, the trial court was never afforded an opportunity to determine the status or disposition of those items. Property divisions reached by the consent of the parties and finalized in writing or on the record may not be set aside or modified absent fraud, duress, or mutual mistake. *Quade v Quade*, 238 Mich App 222, 226; 604 NW2d 778 (1999). Here, plaintiff does not allege any such basis to set aside the settlement agreement clearly set forth and assented to by the parties on the record. Accordingly, we decline to review this issue further.

Finally, plaintiff argues that because the parties did not consent to arbitration the trial court erred in ordering that any dispute regarding additional child or spousal support payments stemming from an inheritance by defendant be submitted to binding arbitration. Defendant does not dispute the error alleged by plaintiff, and we agree that this condition was improperly imposed without the consent of the parties. See, e.g., *Dick v Dick*, 210 Mich App 576, 580-583; 534 NW2d 185 (1995); see also MCL 600.5071, 5072 (requiring stipulation to and acknowledgment of advice of specifically enumerated rights before binding arbitration may be ordered in a domestic relations matter). Consequently, absent consent of the parties on remand and adherence to the requirement of MCL 600.5072, the requirement of binding arbitration regarding the payment of additional child and spousal support should be removed from the judgment of separate maintenance.

We affirm in part, reverse in part, and remand for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Pat M. Donofrio
/s/ Richard A. Bandstra
/s/ Peter D. O'Connell

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[2] In reaching this conclusion, we reject defendant's claim that the trial court has already considered these funds by requiring that defendant report and pay a total of twenty percent of any "inheritance" as additional child and spousal support. The provisions at issue do not clearly require this and thus, even assuming the trial court's requirements in this regard were intended to account for any later received gifts or distributions from the trust fund established by defendant's aunt, the judgment should at the very least be amended to more accurately state that requirement.